



April 22, 2002

Mr. Gary W. Smith  
City Clerk  
City of Baytown  
P.O. Box 424  
Baytown, Texas 77522-0424

OR2002-2020

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 161627.

The City of Baytown (the "city") received a request for copies of:

1. the "worst case" scenario numbers calculated by city officials to estimate what amounts of total back pay is potentially owed by the city to city firefighters; and
2. the dollar amount that was actually offered by the city as part of its settlement offer to these firefighters.

You state that you will make some responsive information available to the requestor. You claim, however, that the submitted information is excepted from disclosure pursuant to sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information, which includes representative sample documents.<sup>1</sup> We have also considered comments submitted by the

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<sup>1</sup> We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that some of the information is subject to section 552.022 of the Government Code. Section 552.022 provides that:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

e. all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[;]

Gov't Code § 552.022(a)(1). The information that we have marked constitutes working papers used to estimate the need for or expenditure of public funds by the city. Thus, this information must be released to the requestor under section 552.022(a)(5) on completion of the estimate, unless it is confidential under other law. Although you claim the marked information is excepted from disclosure pursuant to sections 552.103, 552.107, and 552.111 of the Government Code, these exceptions are discretionary exceptions to disclosure under the Public Information Act that do not constitute "other law" for purposes of section 552.022.<sup>2</sup> Accordingly, the city may not withhold this information from disclosure under sections 552.103, 552.107, or 552.111 of the Government Code, if the estimate associated with this information has been completed.

We note, however, that the attorney-client privilege is also found in rule 503 of the Texas Rules of Evidence. The Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will determine whether the marked information is confidential under rule 503. Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

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<sup>2</sup> Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general).

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503.

A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *See id.* Therefore, in order for information to be withheld from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.-Houston [14th Dist.] 1993, no writ). Based on our review of your arguments and the marked information, we conclude that you have failed to demonstrate that any portion of this information constitutes confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. Accordingly, the city may not withhold any portion of the marked information from disclosure pursuant to rule 503 of the Texas Rules of Evidence.

The attorney work product privilege is also found in rule 192.5 of the Texas Rules of Civil Procedure. For purposes of section 552.022, an attorney's core work product is confidential under rule 192.5. Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *See* Tex. R. Civ. P. 192.5(a), (b)(1). Accordingly, in order to withhold

attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *See id.* Based on our review of your arguments and the marked information, we conclude that you have failed to demonstrate that any portion of this information constitutes the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Accordingly, the city may not withhold any portion of the marked information from disclosure pursuant to rule 192.5 of the Texas Rules of Civil Procedure. Consequently, the city must release the entirety of the marked information to the requestor, if the estimate associated with this information has been completed.

You claim that the remaining information is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code, § 552.103(a), (c). The city maintains the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that the information pertains to pending litigation filed by several firefighters against the city, styled as *Keith Lowell et. al. v. City of Baytown, Texas*, Cause No. 2001-62439. Based on our review of your arguments and the information at issue, we conclude that the city has demonstrated that litigation is pending and that the information is

related to that litigation for purposes of section 552.103. Accordingly, we conclude that the city may withhold from disclosure the remaining information, as well as the marked information, if the estimate associated with that information has not been completed, pursuant to section 552.103 of the Government Code.

However, we note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a) and may not be withheld from disclosure on that basis. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the city must release the marked information to the requestor in its entirety pursuant to section 552.022(a)(5) of the Government Code, if the estimate associated with this information has been completed. The city may withhold from disclosure the remaining information, as well as the marked information, if the estimate associated with that information has not been completed, pursuant to section 552.103 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839.

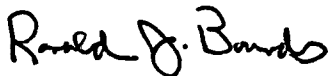
The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/seg

Ref: ID# 161627

Enc. Marked documents

cc: Mr. James W. Liddell  
The Baytown Sun  
1301 Memorial Drive  
Baytown, Texas 77520  
(w/o enclosures)